

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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OSCAR LANDGRAVE,

Case No. 2:21-CV-1684 JCM (NJK)

Plaintiff(s),

ORDER

V.

SAM'S WEST, INC.,

Defendant(s).

Presently before the court is defendants Sam's West, Inc. ("Sam's West") and James Smith's ("Smith") (collectively "defendants") motion to dismiss plaintiff Oscar Landgrave's ("Landgrave") claims against Smith. (ECF No. 6). Landgrave filed a response (ECF No. 10), to which defendants replied (ECF No. 14).

Also before the court is Landgrave's motion to remand this matter. (ECF No. 8). Defendants filed a response (ECF No. 12), to which Landgrave replied (ECF No. 15).

I. Background

This negligence and premises liability matter arises out of an alleged accident that occurred at defendant Sam's West's grocery store—Sam's Club, No. 6382. Plaintiff Landgrave alleges that on May 23, 2019, he stepped onto a pallet holding cases of water on display, walked across it, and tripped. With no warning regarding the pallets, Landgrave fell and injured himself. Landgrave's wife reported this incident to the assistant manager, defendant Smith, who responded to the scene after Landgrave fell. Smith collected statements, watched the surveillance video of the incident, and reported that a case of water was available to Landgrave before he stepped on the pallet.

1 Landgrave alleges that Smith, a non-diverse resident of Nevada, is personally liable to
 2 Landgrave for causing his injuries because Smith failed to act reasonably by failing to inspect,
 3 maintain, clean and/or warn of the dangerous condition of the pallet. Landgrave also alleges that
 4 Smith was responsible for establishing and carrying out the policies and procedures setting forth
 5 reasonable precautions to prevent dangerous conditions. Further, Landgrave alleges that Smith
 6 was responsible for hiring, training and supervising employees to carry out policies and
 7 procedures to prevent dangerous conditions. Further, Landgrave alleges that Smith was not
 8 acting within the scope of his employment and that he was personally negligent.

9 Landgrave filed a negligence premises liability action in Nevada state court on May 18,
 10 2021, naming Sam's West and Smith, as an individual, as defendants. Defendants removed this
 11 action September 13, 2021, despite Smith's presence as a resident defendant, asserting that he
 12 had been fraudulently joined. (ECF No. 1). Defendants now move to dismiss the claims against
 13 Smith (ECF No. 6) and Landgrave moves to remand the case (ECF No. 8).

14 **II. Legal Standard**

15 **A. Motion to Dismiss**

16 Federal Rule of Civil Procedure 8 requires every pleading to contain a “short and plain
 17 statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8. Although
 18 Rule 8 does not require detailed factual allegations, it does require more than “labels and
 19 conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*,
 20 556 U.S. 662, 678 (2009) (citation omitted). In other words, a pleading must have *plausible*
 21 factual allegations that cover “all the material elements necessary to sustain recovery under *some*
 22 viable legal theory.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007) (citation omitted)
 23 (emphasis in original); *see also Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104
 24 (9th Cir. 2008).

25 **B. Motion to Remand**

26 “Federal courts are courts of limited jurisdiction,’ possessing ‘only that power
 27 authorized by Constitution and statute.’” *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting
 28 *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)). Pursuant to 28

1 U.S.C. § 1441(a), “any civil action brought in a State court of which the district courts of the
 2 United States have original jurisdiction, may be removed by the defendant or the defendants, to
 3 the district court of the United States for the district and division embracing the place where such
 4 action is pending.” 28 U.S.C. § 1441(a). “A federal court is presumed to lack jurisdiction in a
 5 particular case unless the contrary affirmatively appears.” *Stock West, Inc. v. Confederated*
 6 *Tribes of Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

7 For diversity jurisdiction under 28 U.S.C. § 1332, the parties must be completely diverse
 8 and the amount in controversy must exceed \$75,000.00, exclusive of interest and costs. *See* 28
 9 U.S.C. § 1332(a); *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1098 (9th Cir. 2003). A
 10 removing defendant has the burden to prove by a preponderance of the evidence that the
 11 jurisdictional amount is met. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403–04
 12 (9th Cir. 1996). Removal based on diversity is subject to the forum defendant rule: “[a] civil
 13 action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this
 14 title may not be removed if any of the parties in interest properly joined and served as defendants
 15 is a citizen of the [s]tate in which such action is brought.” 28 U.S.C. § 1441(b)(2).

16 A plaintiff may challenge removal by timely filing a motion to remand. 28 U.S.C. §
 17 1447(c). On a motion to remand, the removing defendant faces a strong presumption against
 18 removal, and bears the burden of establishing that removal is proper. *Sanchez v. Monumental*
 19 *Life Ins. Co.*, 102 F.3d 398, 403–04 (9th Cir. 1996); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566–67
 20 (9th Cir. 1992).

21 **III. Discussion**

22 Landgrave argues that this matter should be remanded to state court because Smith is a
 23 citizen of Nevada and therefore the parties are not completely diverse. (ECF No. 8). Defendants
 24 argue that the claims against Smith should be dismissed under a theory of fraudulent joinder,
 25 thereby establishing complete diversity and keeping this matter in federal court. (ECF No. 6).
 26 The parties’ dueling motions rest on one issue, whether Smith is a fraudulently joined party to
 27 this matter.

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1 “[F]raudulently joined defendants will not defeat removal on diversity grounds.” *Ritchey*
 2 *v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998) (citations omitted). “Fraudulent
 3 joinder is a term of art. If the plaintiff fails to state a cause of action against a resident defendant,
 4 and the failure is obvious according to the settled rules of the state, the joinder of the resident
 5 defendant is fraudulent.” *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987);
 6 *see also Ritchey*, 139 F.3d at 1318 (“[A] defendant must have the opportunity to show that the
 7 individuals joined in the action cannot be liable on any theory.”). Conversely, “if there is
 8 a possibility that a state court would find that the complaint states a cause of action against any of
 9 the resident defendants, the federal court must find that the joinder was proper and remand the
 10 case to the state court.” *Grancare, LLC v. Thrower by & through Mills*, 889 F.3d 543, 548 (9th
 11 Cir. 2018). “Fraudulent joinder must be proven by clear and convincing evidence.” *Hamilton*
 12 *Materials Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007).

13 Fraudulent joinder of a non-diverse defendant is established in one of two ways: “(1)
 14 actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a
 15 cause of action against the non-diverse party in state court.” *Hunter v. Philip Morris USA*, 582
 16 F.3d 1039, 1044 (9th Cir. 2009) (quoting *Smallwood v. Illinois Cent. RR. Co.*, 385 F.3d 568, 573
 17 (5th Cir. 2004)). The defendant “bears a heavy burden” of proving that the joinder was
 18 improper. *Id.*

19 Here, defendants do not argue actual fraud. Instead, defendants meet the heavy burden to
 20 establish that Landgrave has not alleged a cause of action against Smith. Consistent with the
 21 following, this court finds such possibility, especially in light of Nevada’s less stringent “notice
 22 pleading” regime. *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) (“Nevada is a
 23 notice-pleading jurisdiction, our courts liberally construe pleadings to place into issue matters
 24 which are fairly noticed to the adverse party”).

25 On the one hand, defendants argue that Landgrave fails to provide any authority showing
 26 that an employee can be liable to a patron on a theory of negligence and premises liability. On
 27 the other hand, Landgrave argues that defendants fail to provide any authority showing that
 28 employees cannot be liable for negligence merely because they are employees.

1 Nevada law provides that an entity with ownership, possession, or control of a particular
 2 premises may be held liable under a negligence theory for personal injury caused by a hazardous
 3 condition existing on that premises. *See Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250 (Nev.
 4 1993) (“[A] business owes its patrons a duty to keep the premises in a reasonably safe condition
 5 for use.”); *Hall v. SSF, Inc.*, 112 Nev. 1384, 1393 (Nev. 1996) (“In Nevada, a proprietor owes a
 6 general duty to use reasonable care to keep the premises in a reasonably safe condition for use.”)
 7 (citing *Moody v. Manny’s Auto Repair*, 110 Nev. 320, 331–33 (Nev. 1994)); *Worth v. Reed*, 79
 8 Nev. 351, 354 (Nev. 1963) (“[A]n owner owes an invitee the duty of ordinary care.”) (citing
 9 *Nevada Transfer & Warehouse Co. v. Peterson*, 60 Nev. 87, 90 (Nev. 1939)); *Asmussen v. New*
 10 *Golden Hotel Co.*, 80 Nev. 260, 262 (Nev. 1964) (“[A] proprietor owes his invited guests a duty
 11 to keep the premises in a reasonably safe condition for use” (citing *Doud v. Las Vegas Hilton*
 12 *Corp.*, 109 Nev. 1096, 1101 (Nev. 1993)). Further, it is clear under Nevada law that an employer
 13 cannot avoid liability by delegating the duty to maintain the premises in a reasonably safe
 14 condition to an employee. *Cutler v. Pittsburg Silver Peak Gold Mining Co.*, 116 P. 418, 422
 15 (Nev. 1911) (“The employer cannot delegate this duty [to exercise care, diligence, and caution]
 16 to another and thereby free himself from responsibility.”).

17 Yet, neither party has provided this court with any binding authority or settled Nevada
 18 state law clearly holding either way on the issue of whether an employee whose employment
 19 duties include maintaining a safe premises individually owes that duty to patrons. On the one
 20 hand, this court has found that attempts to avoid federal jurisdiction by adding store employees
 21 as individual defendants are not valid. *See, e.g., Bailey v. Smith’s Food & Drug Centers, Inc.*,
 22 2:20-cv-00328-JAD-VCF, ECF No. 26 at 16 (D. Nev. April 16, 2020); *Mahay v. Wal-Mart*
 23 *Stores, Inc.*, 2:16-cv-2041-JAD-NJK, ECF No. 21 at 13–15 (D. Nev. October 21, 2016) (holding
 24 that “inverse vicarious liability,” where the store manager assumes personal responsibility for the
 25 liability of the employer, does not exist in Nevada). On the other hand, this court has remanded
 26 strikingly similar negligence and premise liability matters involving individual defendants that
 27 Nevada state courts have allowed to proceed. *See, e.g., Guevara v. Walmart Inc., et al.*, 2:20-cv-
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1 00913-JCM-DJA, ECF No. 24 (D. Nev. September 14, 2020) (continuing in state court for over a
2 year after remand until the parties reached a settlement).

3 The court understands that it has previously interpreted Nevada law as definitively
4 precluding premises liability for employees on the basis that they do not owe any duty to patrons.
5 Yet, this court cannot ignore that there is no settled law specifically affirming that interpretation
6 and that state courts have recently allowed similar matters to continue after remand. Therefore,
7 the court holds that, here, “there is a *possibility* that a state court would find that the complaint
8 states a cause of action against any of the resident defendants,” and thus holds that “the joinder
9 was proper and remand[s] the case to the state court.” *Grancare*, 889 F.3d at 548.

10 Therefore, the court grants Landgrave’s motion to remand. Consequently, defendants’
11 motion to dismiss is denied as moot.

12 **IV. Conclusion**

13 Accordingly,

14 **IT IS HEREBY ORDERED, ADJUDGED, and DECREED** that Landgrave’s motion to
15 remand this matter (ECF No. 8) be, and the same hereby is, GRANTED.

16 **IT IS FURTHER ORDERED** that defendants’ motion to dismiss the claims against Smith
17 (ECF No. 6) be, and the same hereby is, DENIED as moot.

18 DATED January 3, 2022.

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UNITED STATES DISTRICT JUDGE

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